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No. 90-1562

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1990

S.J. GROVES & SONS COMPANY AND
JASPER CONSTRUCTION COMPANY,
*Petitioners,*
v.
FULTON COUNTY, GEORGIA,
*Respondent.*

## ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS THE ELEVENTH CIRCUIT

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED FOR REVIEW

(1) Whether the United States Department of Transportation ("DOT") was authorized to promulgate 49 Code of Federal Regulations, Part 23 (hereinafter "49 C.F.R. Part 23")?[1]

(2) Whether an intermediate level of scrutiny is the appropriate standard to evaluate the validity of DOT regulations authorized by Congress, which require State and local government recipients of federal funds pursuant to federal grant agreements to adopt a Minority Business Enterprise program (hereinafter "MBE" program) utilizing goal percentages?

(3) Whether an intermediate level of scrutiny is the appropriate standard to evaluate the validity of Fulton County's 1982-1987 MBE program adopted and developed solely in compliance with DOT Regulations and pursuant to a federal grant agreement?

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[1] Respondent Fulton County, Georgia (hereinafter "Fulco") does not agree with Question No. 1 presented by Petitioner to the extent it suggests 49 C.F.R., Part 23 requires state and local governments to establish a quota or set-aside for awarding contracts solely on the basis of race or ethnic origin.

## LIST OF INTERESTED PARTIES

The parties to the proceedings below are the following:

Petitioners: S.J. Groves & Sons Company

Jasper Construction Company
(Jasper Construction Company is a wholly owned subsidiary of S.J. Groves & Sons Company)

Respondent: Fulton County, Georgia

The United States Department of Transportation was a party in the District Court and an appellant in the Court of Appeals. On September 28, 1989, the Eleventh Circuit dismissed the United States Department of Transportation pursuant to its motion for voluntary dismissal.

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### OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 920 F.2d 752 (11th Cir. 1991), and is reproduced in Petitioners' Appendix at App. 1a. The opinion of the United States District Court is reported at 696 F. Supp. 1480 (N.D. Ga. 1987), and is reproduced in Petitioners' Appendix at App. 1b. The District Court's other orders are unpublished, but are reproduced in the Petitioners' Appendix at App. 1d and 1e.

### JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals was entered on January 7, 1991. Petitioners purport to invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

*U.S. Const., Amend. V:*

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, limb, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

*U.S. Const., Amend. XIV, Sec. 1:*

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

*U.S. Const., Amend. XIV, Sec. 5:*

> The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

*42 U.S.C. § 2000(d) (Title VI):*

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

*Section 30 of the Airport and Airway Development Act of 1970, as amended by the Airport and Airway Development Act Amendments ("AADA") of 1976, 49 U.S.C. § 1730, and as amended by the Airport and Airway Improvement Act ("AAIA") of 1982, 49 U.S.C. § 2219.*

> The Secretary shall take affirmative action to assure that no person shall, on the grounds of race, creed, color, national origin, or sex, be excluded from participating in any activity conducted with funds received from any grant made under this chapter. The Secretary shall promulgate such rules as the Secretary deems necessary to carry out the purposes of this section and may enforce this section, and any rules promulgated under this section, through agency and department provisions and rules which shall be similar to those established and in effect under title VI of the Civil Rights Act of 1964. The provisions of this section shall be considered to be in addition to and not in lieu of the provisions of Title VI of the Civil Rights Act of 1964.

*49 Code of Federal Regulations, Part 23 (45 F.R. 21172 et seq., March 31, 1980, as amended at 46 F.R. 23457 et seq., April 27, 1981, and as amended at 46 F.R. 60458 et seq., December 10, 1981) entitled "Participation by Minority*

*Business Enterprises in Department of Transportation Programs".*

49 C.F.R. § 23.01-23.55 is reprinted in Petitioners' Appendix at App. 1f.

*49 C.F.R. § 21.5(b)(7):*

> This part does not prohibit the consideration of race, color, or national origin if the purpose and effect are to remove or overcome the consequences of practices or impediments which have restricted the availability of, or participation in, the program or activity receiving Federal financial assistance, on the grounds of race, color, or national origin. Where prior discriminatory practice or usage tends, on the grounds of race, color, or national origin to exclude individuals from participation in, to deny them the benefits of, or to subject them to discrimination under any program or activity to which this part applies, the applicant or recipient must take affirmative action to remove or overcome the effects of the prior discriminatory practice or usage. Even in the absence of prior discriminatory practice or usage, a recipient in administering a program or activity to which this part applies, is expected to take affirmative action to assure that no person is excluded from participation in or denied the benefits of the program or activity on the grounds of race, color, or national origin.

*O.C.G.A. § 36-10-2.1 (March 26, 1986):*

> In any county of this state having a population of 550,000 or more according to the United States decennial census of 1980 or any future such

census, contracts for building or repairing any courthouse or other public building, jail, bridge, causeway, or other public works or public property shall be let to the lowest responsible bidder, but the governing authority of any such county shall have the right to reject any or all bids for any such contract. The governing authority of any such county, in considering whether a bidder is responsible, may consider the bidder's quality of work, general reputation in the community, financial responsibility, previous employment on public works, and compliance with a minority business enterprise participation plan or making a good faith effort to comply with the goals of such a plan.

*O.C.G.A. § 36-10-2:*

Whenever it becomes necessary to build or repair any courthouse, jail, bridge, causeway, or other public works in any county, the county governing authority shall cause the same to be built or repaired by letting out the contract therefor to the lowest bidder, at public outcry, before the courthouse door, after having advertised the letting of the contracts, as provided in Code Section 36-10-3, provided that such county authorities shall have authority to reject any and all bids at the public letting. If in their discretion, the public interest and economy require it, the county authorities may build or repair other public property in the county by contract or sealed proposals, to be invited under the same provisions as to specifications and like information as are provided in Code Sections 36-10-3 and 36-10-4.

## STATEMENT OF THE CASE

This case arises out of a resurfacing project at the Fulton County ("Fulco") Airport. The Fulco Airport is designated as a "reliever airport" by the United States Federal Aviation Administration ("FAA"). The function of a reliever airport is to provide facilities to divert as much general aviation traffic from air carrier airports such as Hartsfield International Airport as is possible in the interest of safety to the traveling public using such fields. Because Fulco's Airport is a designated "reliever airport" it is eligible for federal assistance under the provisions of the Airport and Airway Development Act of 1970, as amended in 1976 (49 U.S.C. § 1701 *et seq.*(1976)) ("AADA"), and as amended in 1982 (Airport and Airway Improvement Act of 1982) ("AAIA") (49 U.S.C. § 2201 *et seq.*).

One of the purposes of the AADA and AAIA was to make funds available for improvements to reliever airports because of the critical purpose they serve in connection with aviation traffic and safety to the travelling public. 1982 U.S. Code Cong. & Ad. News 1156, 1159, 1161, 1163, 1165, 1175; 1976 U.S. Code Cong. & Ad. News 1600, 1602-04, 1608, 1611, 1637-1640, 1644. According to the legislative history of the AADA and AAIA, "reliever airports" serve a vital role *nationwide*, and it is a *federal* policy to maintain the operation of and improve reliever airports. *Id.*

It is with this background that the FAA determined Fulco's instrumented runway was in a *"rapidly"* deteriorating condition, that it "would soon become hazardous and unusable" and that the runway would have to be closed if it was not repaired immediately. The DOT/FAA also determined that the Airport project *"be furnished a high-priority status to federal funds."* Closing

the runway would have resulted immediately in closing the airport. The undisputed evidence establishes that because Fulco did not have sufficient funds *at that time* to repair the runway, Fulco in order to keep the airport in operation had no alternative except to apply for a grant from the United States Department of Transportation ("DOT") pursuant to the AADA.

As an express condition to approval of the Federal Grant Agreement from the FAA and the DOT, Fulco was required to comply with the provisions of the AADA and the regulations promulgated by the DOT, including the provisions of 49 Code of Federal Regulations, Part 23 (45 F.R. 21172 et. seq., March 31, 1980 as amended at 46 F.R. 23457 et seq., April 27, 1981 and as amended at 46 F.R. 60458 et seq., December 10, 1981) (hereinafter "49 C.F.R. Part 23") entitled "Participation by Minority Business Enterprises in Department of Transportation Programs". The DOT Regulations and Federal Grant required Fulco to prepare and submit for approval by the FAA a Minority Business Enterprise ("MBE") program solely for the Airport Project. [See Cross-Petitioner Fulco's Appendix at 1a]. In compliance with the DOT Regulations and Federal Grant, Fulco prepared the MBE program for the Airport Project in 1982.

The MBE percentage goals as required by the DOT Regulations were based upon the availability of qualified MBE's in the area, the type of work involved on a particular project, and past experience with other MBE programs. 49 C.F.R. § 23.45(g). A contractor who was unable to meet those goals, however, could still be awarded the contract if it exercised good faith efforts to meet the goals. 49 C.F.R. 23.45(h). Pursuant to the DOT Regulations, satisfying the MBE goals or making a good faith effort to meet the goals was a condition of Fulco's

receiving the DOT assisted contract. [*Id.*]. *The Fulco MBE Program was developed solely to comply with the DOT Regulations and as an express condition of the Grant Agreement.* Fulco was contractually bound to the commitments made in the MBE program as approved by the DOT.

The Fulco 1982 MBE Program was a five-year program solely for construction at the Fulco Airport. The DOT/FAA reviewed the Fulco Program and determined its compliance with 49 C.F.R. Part 23 (in effect in April 1982), including the minority and female percentage goals. Fulco's MBE Program was approved by the FAA/DOT in April 1982.

In approving the Fulco MBE Program the FAA considered in particular whether the MBE participation percentage goals set by Fulco were reasonable, practical, and complied with 49 C.F.R. Part 23.45. It was determined by the FAA based on this analysis that the Fulco MBE Program complied with 49 C.F.R. § 23.45. The percentage goals for the MBE Program were considered reasonable and attainable and were approved by the FAA. The Fulco 1982 MBE Program complied with the DOT Regulations in every respect and the Program was submitted to and approved by the FAA.

The MBE participation percentage given by Groves with its bid was 4.15%, a number which was not documented as required by the Bid Specifications. The second lowest bid received (approximately $22,000 higher on a $800,000 plus contract) contained the MBE participation level of 10%. The third lowest bid contained the MBE participation level of 22%.

Fulco conditionally awarded the contract to Groves provided that it make a good faith effort to increase its

MBE participation pursuant to the DOT Regulations. Approximately one month later Groves had not increased its 4.15% MBE participation figure. At its next regularly scheduled Board Meeting, Fulco determined that Groves had not used good faith efforts to increase its MBE participation.

Thereafter, Fulco conditionally awarded the contract to the second lowest bidder which had the MBE participation level of 10% in its original bid. The award was conditioned upon that bidder's good faith efforts to increase its MBE participation. Two days following the conditional award of the contract, it increased its MBE participation from 10% to 16%. Fulco determined that a 6% increase in two days constituted a good faith effort on the part of the second lowest bidder, and although it did not achieve the 22% MBE/FBE goal, it awarded the contract to the second lowest bidder with the approval of the FAA.

In its September 30, 1985 Order the District Court, *inter alia*, deferred the cross-motions for summary judgment filed by the parties pending resolution of the validity of the DOT Regulations, and ordered that the DOT be joined as a party defendant. [Petitioners' App. at 1c, 33c]. The District Court concluded that if the DOT Regulations are valid, they would preempt the Georgia low-bid statute, even if Fulco violated that statute. [*Id.*].

Subsequently, the DOT and the Secretary of the DOT were joined to defend the validity of the DOT Regulations. The District Court held the DOT Regulations were invalid. *S.J. Groves & Sons Company and Jasper Construction Company v. Fulton County, Georgia*, 696 F. Supp. 1480 (N.D. Ga. 1987).

The District Court also held that Fulco's 1982 MBE Program for the Airport Project was invalid. The Court stated that reliance on valid DOT Regulations would have provided a defense to Groves' claims against Fulco since it would preempt the Georgia low-bid statute and the State Constitution and would be consistent with Title VI and the Fourteenth Amendment. [Petitioners' App. at 2d]. However, since the Court held the DOT Regulations were invalid, the Court held that reliance on the DOT Regulations by Fulton County did not provide it with a defense. [*Id.*].

The Fulco Program contained an overall 20% MBE and 2% Female Business Enterprise *goal* concerning *all* the projects at the Fulco Airport over a five year period. ***The MBE goal is not a quota or a "set-aside".*** Fulco may award any contract on an individual basis to a contractor who achieved less than 22% participation, and in fact *that is exactly what happened on the Airport Project Groves bid on.* Any Fulco contract for the Airport may contain less than 20% and even 0% MBE participation depending on the availability of qualified MBE's for a particular contract.

Fulco in its application of the Program considers good faith efforts to obtain the goal. If a bidder does not achieve the goal, it still may receive an award of the contract if it exercises good faith efforts to achieve that goal, but is unable to do so. Fulco has an administrative review procedure in its application of the Program and considers each contract on an individual basis.[2]

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[2] The Fulco 1979 Resolution referred to by Groves in Fulco's Policy Statement has nothing to do with the claims Groves has asserted against Fulco relating to the 1982 Fulco MBE Program for projects at the airport adopted in compliance with the DOT Regulations.

## REASONS FOR DENYING THE WRIT

*I. The Eleventh Circuit Correctly Held That Congress Authorized The DOT Regulations, And Therefore, They Have The Force And Effect of Law.*

The Eleventh Circuit correctly held that Congress authorized the DOT to promulgate the DOT Regulations. *S.J. Groves*, 920 F.2d at 764. Substantive agency regulations have the "force and effect of law," and therefore preempt state statutes, only when they are "rooted in a grant of [legislative] power by the Congress and subject to limitations which that body imposes." *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979); *S.J. Groves*, 696 F. Supp. 1480, 1483 (N.D. Ga. 1987), *aff'd* 920 F.2d 752, 764 (11th Cir. 1991). "[I]t is necessary to establish a nexus between the regulations and some delegation of the requisite legislative authority by Congress." *Chrysler Corp.*, 441 U.S. at 304. "What is important is that the reviewing court reasonably be able to conclude that the grant of authority contemplates the regulations." *Id.* at 308; *S.J. Groves*, 920 F.2d at 764; *S.J. Groves*, 696 F. Supp. at 1483.

The DOT identifies eight sources of authority for the DOT Regulations. 49 C.F.R. 23.1(b). The Eleventh Circuit considered only the AADA of 1970 because it concluded Section 30 of the AADA as amended in 1976 (49 U.S.C. § 1730), and as reenacted (changing the number only) in 1982 in the Airport and Airway Improvement Act (49 U.S.C. § 2219), authorizes the DOT to enact its MBE

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Contrary to Groves' assertion, that Resolution did not apply to all county contracts regardless of the source of funding, and specifically did not apply to the Airport Project Groves bid on. The only relevance of the 1979 Resolution is that it shows Fulco made findings of past discrimination against MBEs.

regulations. *S.J. Groves*, 920 F.2d at 764. Section 30 provides:

> The Secretary shall take affirmative action to assure that no person shall, on the grounds of race, creed, color, national origin, or sex, be excluded from participating in any activity conducted with funds received from any grant made under this chapter. The Secretary shall promulgate such rules as the Secretary deems necessary to carry out the purposes of this section and may enforce this section, and any rules promulgated under this section, through agency and department provisions and rules which shall be similar to those established and in effect under title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000 et seq.]. The provisions of this section shall be considered to be in addition to and not in lieu of the provisions of title VI of the Civil Rights Act of 1964.

The Eleventh Circuit found two reasons why Section 30 authorizes the DOT Regulations. First, the actual language of Section 30 indicates a "broad delegation of power to the DOT to create regulations necessary to ensure there is no discrimination by recipients of federal funds under the AADA." *S.J. Groves*, 920 F.2d at 764. Second, Section 30 "endorses rules similar to those established under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and those rules condone, and in some cases require, race-conscious regulations and/or actions. *See* 49 C.F.R. § 21.5(b)(7)." *Id.*[3]

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[3] 49 C.F.R. § 21.5(b)(7) provides:

> This part *does not prohibit the consideration of race*, color, or national origin if the purpose and effect are to remove

The Eleventh Circuit and the District Court correctly concluded that the AADA grants the DOT the authority to effectuate the Act's purposes, and those purposes explicitly condone and in some cases require race-conscious regulations and/or remedies. *S.J. Groves*, 920 F.2d at 764; 696 F. Supp. at 1484. Therefore, the DOT acted within the bounds of properly delegated congressional authority in promulgating the MBE Regulations.

Senator Beall in introducing the floor amendment to add Section 30 to the AADA explained his amendment as follows:

> Mr. President, I consider this to be in the nature of a technical amendment actually but *it will insure minority and female participation in program activities under the Airport Development Act. This amendment will*

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or overcome the consequences of practices or impediments which have restricted the availability of, or participation in, the program or activity receiving Federal financial assistance, on the grounds of race, color, or national origin. *Where prior discriminatory practice or usage tends on the grounds of race, color, or national origin to exclude individuals from participation in,* to deny them the benefits of, or to subject them to discrimination under any program or activity to which this part applies, *the applicant or recipient must take affirmative action to remove or overcome the effects of the prior discriminatory practice or usage.* Even in the absence of prior discriminatory practice or usage, *a recipient in administering a program or activity to which this part applies, is expected to take affirmative action* to assure that no person is excluded from participation in or denied the benefits of the program or activity on the grounds of race, color, or national origin. (emphasis added).

> *require the development of affirmative action plans* that will require that a portion of the money going to construction, concessions, and other projects of the airport development are *earmarked for minority and female business persons.*
>
> Although I am aware that there has been assurance of minority and female participation in these programs by the Department of Transportation in the past I am introducing this amendment so that airport management will be required to adhere to the Department of Transportation's administrative regulations and *will be required to contract with minority and female owned forms* [sic].

122 Cong. Rec. 8200 (Mar. 25, 1976) (emphasis added). [Respondent App. at 1A].

In the House of Representatives, Representative Dellums in offering the same amendment to add Section 30 to the AADA stated:

> Mr. Chairman, this is a technical amendment designed to *assure minority participation in program activities under this act.* The language of the amendment is similar to -- and based upon -- comparable provisions enacted by Congress for other major programs such as the Trans-Alaska Pipeline.
>
> The need for this amendment came to my attention through a series of meetings held within the last 45 days and conducted by my colleague from Maryland (Mr. Mitchell) and myself with representatives of the Federal Aviation Administration, the Office of Minority

> Business Enterprise, the Small Business Administration and minority businessmen. Those meetings centered on existing ADAP regulations, agreements and effectiveness, and it became apparent to me in those discussions that minority entrepreneurs had had little share in projects funded under ADAP. *This amendment stipulates that the Secretary of Transportation develop regulations to provide affirmative action needed to remedy that problem.*

121 Cong. Rec. 41802 (Dec. 19, 1975) (emphasis added). [Respondent App. at 1B].

This Court recognizes that floor remarks of Members of Congress are a valuable source of information regarding Congress' intent in enacting legislation.[4] In fact, former Chief Justice Burger's opinion in *Fullilove v. Klutznick*, 448 U.S. 448 (1980) relied heavily on floor remarks of various Members of Congress. *See Fullilove*, 448 U.S. at 458-463 nn. 14, 20-34, and 39-41 and accompanying text.

Therefore, the DOT's establishment of an affirmative action program was mandated by Congress, just as the Public Works Employment Act MBE set-aside in *Fullilove* was mandated by Congress. The introduction of Section 30 to Congress made it clear that it *"will require the development of affirmative action plans* that will *require that a portion of the money* going to construction

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[4] See *Rice v. Rehner*, 463 U.S. 713, 728, (1983) (sponsor's remarks are *"particularly valuable"* and "an *authoritative guide* to the statute's construction."); *Bowsher v. Merck & Co.*, 460 U.S. 824, 832 (1983); *North Haven Board of Education v. Bell*, 456 U.S. 512, 527 (1982). *See also Lewis v. United States*, 445 U.S. 55, 62-63 (1980). Floor remarks are

. . . of the airport development are earmarked for minority and female business persons." 122 Cong. Rec. 8200 (March 25, 1976) (emphasis added). Moreover, the stated purpose of Section 30 to Congress was "to *assure minority participation* in program activities under this act." 121 Cong. Rec. 41802 (December 19, 1975) (emphasis added).[5]

In an attempt to avoid the Eleventh Circuit's conclusion that the AADA's reference to Title VI rules incorporates Subsection 7 (49 C.F.R. § 21.5(b)(7)), Groves for the first time in this case argues that Congress did not authorize Subsection 7 under the Civil Rights Act of 1964 (Title VI), and therefore the AADA's reference to that rule cannot provide authority for the DOT Regulations. This argument has never been raised in this case, Groves did not raise it below in either the District Court or the Court of Appeals, and there has been no briefing or argument concerning this issue in those Courts. Groves has not preserved for this Court's review this issue it now presents for the first time in its Writ of Certiorari.

It is the general rule of this Court that it does not grant certiorari to consider issues which were not properly argued or preserved below. *See e.g., Tennessee v. Dunlap*, 426 U.S. 312, 316 n.3 (1976); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.13 (1976). "We decline to

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even more important where, as here, the provision at issue originated as a floor amendment. *See Bowsher, supra; Bell, supra; Lewis, supra.*

[5] Another source of authority for the DOT's MBE regulation is § 905 of the Railroad Revitalization and Regulatory Reform Act (RRRRA) of 1976, Pub. L. 94-210, 90 Stat. 31 (formerly 45 U.S.C. § 803, now codified at 49 U.S.C. § 306). The Senate Report accompanying the RRRRA, S. Rept. No. 94-499, at pages 44 and 45, reprinted in 1976 USCCAN 58-59, also strongly indicated Congress' intent that an affirmative action program be created.

address this argument because respondent failed to raise it below and because the question it imposes has not been adequately briefed and argued." *Grandfinaciera v. Nordberg*, 492 U.S. ___, 106 L.Ed.2d 26, 38-39 (1989).

Because this argument has not been raised below, this Court lacks guidance from the District Court or the Court of Appeals on this issue. Since in the nine years of proceedings in this case, this argument or issue was never raised by Groves and never addressed by any court below, it is unfair and unnecessary to consider it as a subject of Groves' Petition and without the benefit of the views of the Courts below.

The Secretary of Transportation's determination that it was Congress' intent that an affirmative action program was to be created is entitled to substantial deference. *United States v. Rutherford*, 442 U.S. 544, 553-554 (1979) ("Such deference is particularly appropriate where, as here, an agency's interpretation involves issues of considerable public controversy, and Congress has not acted to correct any misperception of its statutory objectives.") In the instant case, as in *Rutherford*, the DOT's interpretation that Section 30 of the AADA requires an "affirmative action" program "involves issues of considerable public controversy, and Congress has not acted to correct any misperception of its statutory objectives." The DOT's construction of Section 30 therefore "is entitled to substantial deference."

Moreover, in 1982 Congress replaced the 1976 AADA with the AAIA and reenacted in the new AAIA a provision identical to Section 30 of the 1976 AADA. 49 U.S.C. § 2219. It is a well-established principal of law that "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without

change." *Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 382 n.66, (1982). The reenactment of Section 30 of the AADA also took place after *M.C. West, Inc. v. Lewis*, 522 F. Supp. 338 (M.D. Tenn. 1981).

## *II. The Eleventh Circuit Correctly Held That An Intermediate Level Of Scrutiny Is The Appropriate Standard To Determine The Constitutionality Of The DOT Regulations*

In *Metro Broadcasting, Inc. v. F.C.C.*, 110 S.Ct. 2997 (1990), this Court utilized an intermediate level of scrutiny in evaluating the validity of federal agency regulations. The Eleventh Circuit correctly held that an analysis of *Fullilove, Croson,* and *Metro Broadcasting* establishes that an intermediate level of scrutiny, not strict scrutiny, is the appropriate standard of review in evaluating the validity of federal regulations like the DOT Regulations.

In *Metro Broadcasting* this Court held "that benign race-conscious measures mandated by Congress – even if those measures are not 'remedial' in the sense of being designed to compensate victims of past government or societal discrimination – are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to the achievement of those objectives." 110 S.Ct. at 3008-09. The majority opinion in *Metro Broadcasting* "made it clear that *Croson* does not prescribe the level of scrutiny to be applied to a benign racial classification employed by Congress." *Id.* at 3009. The opinion of this Court in *Metro Broadcasting* instead relied on *Fullilove*, asserting that a "majority of the Court in *Fullilove* did not apply strict scrutiny to the race-based classification at issue." *Id.* at 3008.

The Eleventh Circuit correctly concluded that a "clear demarcation between affirmative action programs developed by state and local governments and those developed at the direction of Congress was drawn." *S.J. Groves*, 920 F.2d at 767. "Therefore, it seems to us that the Court has created a dual inquiry for evaluating affirmative action programs. First, we must determine whether a state or local government has developed the program, or *whether Congress has authorized the program's creation*. If the former, a Court must strictly scrutinize the program. . . . If the latter, however, then an intermediate level of scrutiny is appropriate." 920 F.2d at 767 (emphasis added). "Intermediate scrutiny means the program must serve an important governmental interest and the means must be substantially related to the achievement of that objective." *Id.*

Because Congress authorized the creation of the MBE program contained in the DOT Regulations, an intermediate level of scrutiny is the appropriate standard in evaluating the regulations. 920 F.2d at 767. The Eleventh Circuit remanded the case for reconsideration in the District Court in light of the intermediate level of scrutiny standard. *Id.*

As shown in Part I, *infra*, the federal statute and regulatory scheme for the AADA, in particular the introduction and passage of Section 30 to the AADA amendments of 1976 and its reenactment in the AAIA of 1982, establishes that its purpose was to insure MBE participation in federal government projects and mandate the development of affirmative action plans.

On March 6, 1978 the DOT issued Order 4000.7A, which reemphasized the enforcement of DOT's MBE Program, and like DOT Circular 1165.1 encouraged all grant recipients to establish percentage goals for MBE

participation. DOT Order 4000.7A provided that the policy of the DOT was to encourage and increase the participation of MBE's in contracts and projects funded by the DOT, and the DOT required its operating elements and all aid recipients and their contractors to make "affirmative action" efforts to meet goals for increasing MBE involvement.

In November 1978 Congress passed the Surface Transportation Assistance Act of 1978 ("STAA"), Pub. L. No. 95-599, 92 Stat. 2689 (1978). In the STAA legislative history, "the House Report of the Committee on Public Works and Transportation acknowledged a departmental initiative on behalf of the . . . (DOT) to encourage the participation of minority business enterprises in the DOT's programs." H.R. Rep. No. 95-1485, 95th Cong., 2d Sess., *reprinted in* 1978 U.S. Code Cong. & Ad. News 6575, 6647:

> The Committee is aware that Secretary of Transportation Adams on March 6, 1978, issued a major *Departmental* initiative to encourage participation by minority businesses *in DOT's programs*. Among the mechanisms provided in the new order are requirements that the operating elements *within DOT* establish percentage goals for minority utilization, and that *DOT grantees* prepare written affirmative action plans that include goals, and when allowed by state law, provision under appropriate circumstances for set-asides limited for bidding to minority firms . . . . The Committee supports this strong action by the Secretary and encourages vigorous efforts to carry out the spirit and intent of the new Department Order.

The March 6, 1978 DOT initiative referred to above by the Committee is DOT Order 4000.7A. Congress in the STAA at 49 U.S.C. § 1516(a)(2) specifically delegated to the Secretary of the DOT the responsibility to take affirmative action to insure compliance with Congress' determination that minorities were not fully participating in public contracts at the federal, state and local level. Section 1615(a)(2) of the STAA is virtually identical to Section 30 of the AADA. There is no distinction drawn or limitation applied by Congress with regard different types of federally-funded government contracts in its "finding" that MBE's were not fully participating in public contracts at the federal, state and local level involving the DOT. This is a Congressional finding relating to all federally-funded government contracts involving the DOT, including contracts under the AADA.

In *Fullilove*, Chief Justice Burger stated that in 1977 "Congress had abundant evidence from which it could conclude that minority businesses have been denied effective participation in public contracting opportunities by procurement practices that perpetuated the effects of prior discrimination . . . . [T]here was direct evidence before the Congress that this pattern of disadvantage and discrimination existed with respect to state and local construction contracting as well." 448 U.S. at 478; *see Id.* at 461-467. The Court held that although Congress did not, and need not, make the kind of "findings" which would be required of a state or local government, "we are satisfied that Congress had abundant historical basis from which it could conclude that traditional procurement practice, when applied to minority businesses, could perpetuate the effects of prior discrimination." 448 U.S. at 478.

The substantial remedial power of Congress is reaffirmed in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). The Court held that "Congress may identify and redress the effects of society-wide discrimination", and Congress does not have to make findings of discrimination with the specificity as the states or local governments: "the City is not just like the *federal government* with regard to the findings it must make to justify race-conscious remedial action." *Croson*, 488 U.S. at 491 and *quoting Associated General Contractors of California v. City and County of San Francisco*, 813 F.2d 922, 929 (9th Cir. 1987) (emphasis added). Justice O'Connor, along with Chief Justice Rhenquist and Justice White concurring, *do not make a distinction between the branches of the "federal government"* with regard to the findings in connection with race-conscious remedial action.

Moreover, *Croson* reaffirms that Congress, unlike the States, may "induce voluntary action to assure compliance with existing federal statutory or constitutional antidiscrimination provisions . . . [and] also, where Congress has the authority to declare certain conduct unlawful, *it may . . . authorize and induce state action* to avoid such conduct." *Croson*, 488 U.S. at 488, *quoting Fullilove* 448 U.S. at 483-484 (emphasis added). *Croson* also reaffirms that Congress can empower states to implement remedial programs that the States could not do, constitutionally, on their own account: "Congress may authorize, pursuant to section 5 [of the Fourteenth Amendment], state action that would be foreclosed to the States acting alone." 488 U.S. at 491.

Groves ignores Justice Powell's explicit statement in *University of California Regents v. Bakke*, 438 U.S. 265 (1978), that the *Bakke* decision "does not call into

question *Congressionally authorized administrative actions . . . .*" *Bakke*, 438 U.S. 302, n.41 (emphasis added). Therefore, since the DOT Regulations were "Congressionally authorized administrative actions", *Metro Broadcasting, Bakke, Fullilove* and *Croson* make it clear that federal administrative agency findings enjoy the same deferential treatment as Congress, and that there is no material distinction between the PWEA MBE Program in *Fullilove* and the DOT Regulations promulgated pursuant to Section 30 of the AADA, for purposes of determining the level of scrutiny to apply in evaluating the Regulations.

*III. The Eleventh Circuit Correctly Held That Metro Broadcasting Applies In Determining The Constitutionality Of Federal Regulations In Public Contracting*

Contrary to the suggestions by Groves, there is no authority for the position that *Metro Broadcasting* does not apply to MBE programs in the public contracting arena or that under *Croson* every MBE program in the public contracting arena should be reviewed under the strict scrutiny standard. Justice Stevens' concurring opinion in *Metro Broadcasting* does not indicate that *Metro Broadcasting* is inapplicable to affirmative action programs in public contracting. Justice Stevens specifically stated as follows: "I join both the opinion and the judgment of the Court". *Metro Broadcasting*, 110 S.Ct. at 3028. It is clear that the opinion and judgment of the Court in *Metro Broadcasting* was to apply an intermediate level of scrutiny in evaluating an affirmative action program promulgated by a federal agency where Congress authorized the program's creation.

Justice Stevens did not indicate any distinction as to the standard of scrutiny applied in *Metro Broadcasting*

from that to be applied in the public contracting arena. Groves is merely speculating in its argument that Justice Stevens' opinions suggest any kind of distinction between the scrutiny that should be applied in evaluating congressionally authorized federal regulations depending upon the subject matter of the regulations.

Moreover, Justice O'Connor in her dissenting opinion in *Metro Broadcasting* indicates that Justice Stevens' opinion in *Fullilove* did not apply strict scrutiny in the public contracting arena. *Metro Broadcasting*, 110 S.Ct. at 3032. This Court should not grant certiorari to limit the ruling of *Metro Broadcasting* to selectively exclude federal agency public contracting programs.

## *IV. The Eleventh Circuit Correctly Held That The Implementation By Local Governments Of A MBE Program Pursuant To A Federal Grant Agreement Adopted In Compliance With Congressionally Authorized Federal Regulations Should Be Evaluated Under An Intermediate Level Of Scrutiny*

The federal statute and regulatory scheme, legislative history, and the historical context in which Section 30 arose establish that there was a clear Congressional mandate for the DOT to promulgate 49 C.F.R. Part 23, Subpart C, and for Fulco to promulgate its 1982 MBE Program. The broad remedial powers of Congress are specifically involved in Section 30 of the AADA, 49 C.F.R. Part 23, and Fulco's implementation of the federal remedial program. Fulco in implementing the MBE provisions of its contract with the United States pursuant to the AADA "was acting pursuant to Congress' compelling interest in eradicating the continuing effects of past discrimination against minorities in the participation of government contracts." *Fullilove*, 448 U.S. 497, (Powell, J. concurring).

The DOT Regulations establish a federal remedial program with which Fulco must comply to receive federal funds. When Fulco implements Congress' plan as developed by the DOT Regulations, it is acting in a quasi-federal capacity, as an agent of the federal government, not as a county. Therefore, Fulco is not in the same position as was the City of Richmond and is not obligated to meet the *Croson* requirements.

The Court in *Fullilove* relied primarily on the Spending Power and Section 5 in upholding the PWEA's MBE set-aside. The Court noted that it "has repeatedly upheld against constitutional challenge the use of [the Spending Power] to induce governments and private parties to cooperate voluntarily with federal policy." 448 U.S. at 474. *See South Dakota v. Dole*, 483 U.S. 203, 206-207 (1987). Because Congress can require local governments and states to comply with race conscious requirements, which *Fullilove* held is within Congress' power, state and local government implementation to fulfill those requirements must be reviewed under the same standard of scrutiny applicable to a congressional statute. This is because in such a case the *state or local legislation is not a state or local program, but rather is the final step in the implementation of a congressionally created federal remedial program.*

Congress can "induce voluntary action to assure compliance with existing Federal statutory or constitutional antidiscrimination provisions . . .", including state or local government actions that would be foreclosed to the local government or states if they were acting alone. *Croson*, 488 U.S. at 488. Fulco acted pursuant to the congressional authority of the AADA/AAIA and the DOT Regulations, when it adopted its Program. Therefore, the *federal nature* of the DOT Regulations and

Fulco's MBE Program establish that the requirements of *Croson* are inapplicable.

In *Fullilove* the PWEA of 1977, which was upheld by the Court, operated and was implemented in a manner virtually identical to the federal program in this case. Congress appropriated money for construction projects which would be distributed to state and local grantees. Those grantees would use the federal funds to award contracts paid for in whole or in part with the federal assistance, and would require of its contractors that a percentage of each grant be provided to MBE's.

In upholding the PWEA "set-aside", the Court in *Fullilove* relied on Congress' authority under Section 5 of the Fourteenth Amendment to enforce the Equal Protection Clause, the Federal Spending Power, and Congress' determination that there was a problem of *nationwide scope* requiring a *nationwide* remedy: "[T]here was direct evidence before the Congress that this pattern of disadvantage and discrimination existed *with respect to state and local construction contracting* as well. In relation to the MBE provisions, Congress acted within its competence to determine that the problem was *national in scope.*" 448 U.S. at 478 (emphasis added). Once Congress concluded existing public contracting practices would be "perpetuating the prevailing impaired access by minority businesses to public contracting opportunities," the Court found that Congress had the authority to establish a *nationwide remedy. Id.* at 475.

Where, as in this case, a local or state program is enacted to implement federal legislation or regulations imposing requirements on the local or state government, and the legislation or regulations are an integral part of the federal-state-local legislative framework, the local or

state MBE program should be considered a subsidiary element of the federal legislation or regulations.

The Court in *Fullilove* recognized that Congress' decision to require *all* states and localities accepting federal funds to adopt MBE programs did not depend on findings by a particular state or local grantee. *See Milwaukee County Pavers Assn. v. Fiedler*, 710 F. Supp. 1532, 1545-47 (W.D. Wis. 1989), *modified in part*, 731 F. Supp. 1395, 1409-1410, *aff'd* 922 F.2d 419 (7th Cir. 1991) (A local government implementing a federal program need not make independent findings, but rather may rely on Congress' findings).

This Court has rejected the distinction suggested by Groves for local governments, holding that once Congress has exercised its authority to determine that nationwide legislation was necessary, no further findings by any locality are necessary. *E.g., Lau v. Nichols*, 414 U.S. 563, 564-568 (1974), *cited with approval in Fullilove*, 448 U.S. at 479-480; *Oregon v. Mitchell*, 400 U.S. 112, 233, 284 (1970); *Katzenbach v. Morgan*, 384 U.S. 641, 648-649 (1966). In *Oregon v. Mitchell*, the Court refused to require state-by-state findings before a nationwide application would be appropriate. 400 U.S. at 284. In *Lau* there were no findings of discrimination; nevertheless, the Court upheld a federal regulation applicable to public school systems receiving federal funds subject to statutory and administrative conditions. 448 U.S. at 479.

The DOT Regulations and Fulco's 1982 MBE Program contain virtually all the limitations and waiver provisions the Court identified in *Fullilove*. First, Congress found that other alternative remedies had failed, and therefore the use of an MBE program on a nationwide basis was necessary. *Fullilove*, 448 U.S. at 463-68, and 448 U.S. at 511 (Powell, J. concurring). The federal

program in *Fullilove*, the DOT Regulations and the Fulco MBE Program operate prospectively only. 448 U.S. at 481. Both permit a waiver of the percentage goal, if it can be shown that the goals in good faith could not be met. 448 U.S. at 487-89; 448 U.S. at 514 (Powell, J. concurring). The percentage chosen as a goal is not unreasonable. 448 U.S. at 513 (Powell, J. concurring). Both included a complaint/certification procedure to insure that only bona fide minority firms were eligible. 448 U.S. at 482; 49 C.F.R. § 23.45(c),(e) and (f). Both are of limited duration. Fulco's Program expired in 1987.

The good faith provision in the DOT Regulations and Fulco's Program would permit a waiver of the MBE requirement in the event that a MBE was charging an unreasonable price. There is nothing in the record suggesting Groves was rejected as a bidder because Fulco was insisting it accept an MBE who was requesting an unreasonably high price.

Groves attempts to distinguish *Fullilove* from the instant case based upon the fact that under the PWEA Congress expressly set aside 10% of the monies for minority contractors while under the AADA the MBE mechanism was left up to the DOT to put into place. This, however, is a distinction without significance.[6] The PWEA set-aside included a waiver provision which, as Justice Powell noted, was a virtue because it took into account "the availability of qualified minority contractors in a particular geographic area, the size of the locale's minority population, and the efforts made to find minority contractors." 448 U.S. at 514.

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[6] *Fullilove* attached little significance to the difference between the "thou-shalt-not discriminate" regulation in *Lau* and the affirmative action program in *Fullilove*. 448 U.S. at 479.

The net effect of the structure of Section 30 and the MBE regulation is the same as the PWEA MBE set-aside. Rather than Congress setting a rigid quota and directing the Secretary to determine exceptions to it, as under the PWEA, the MBE regulation merely allows the Secretary to approve the percentage *and* the exceptions thereto. 49 C.F.R. Part 23.

In addition to the waiver provisions, the PWEA MBE set-aside and Fulco's MBE Program (in conjunction with the DOT's MBE Regulations) have other similarities: neither overinclusive nor underinclusive, 448 U.S. at 485-486, involvement with only a minimal amount of total construction work (and therefore little burden on nonminorities), *Id.* at 514-515, and periodic review. There is no practical difference between the policy and administrative approach of the Fulco Program and the DOT Regulations, and the policy and administrative approach upheld in *Fullilove*.

*V. Supreme Court Review Of This Action Is Premature*

This case is not ripe for review. The decree that Groves is seeking to be reviewed by certiorari is not a final one, a fact that alone furnishes sufficient ground for denial of the Petition. *Hamilton Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 257-258 (1916). "[E]xcept in extraordinary cases, a writ of certiorari does not issue until there is a final decree." *Id.*

The Eleventh Circuit remanded this case to the District Court. 920 F.2d at 767, 769. "[B]ecause the Court of Appeals remanded the case, it is not ripe for review by this Court." *Brotherhood of Locomotive Firemen v. Bangor & Arrostook R.R.*, 389 U.S. 327, 328 (1967).

## CONCLUSION

For all the foregoing reasons, Respondent Fulton County, Georgia respectfully requests that this Court deny the Petition for a Writ of Certiorari.

DATED: May 8, 1991
Atlanta, Georgia

Respectfully submitted,
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# APPENDIX 4

# RESPONDENT IN OPPOSITION

## INDEX TO APPENDIX

122 Cong. Rec. 8200 (March 25, 1976) (statement of Sen. Beall) ..... 1A

121 Cong. Rec. 41802 (December 18, 1975) (statement of Rep. Dellums) ..... 1B

. . .

Mr. BEALL. Mr. President, I send an amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report the amendment.

The second assistant legislative clerk read as follows:

The Senator from Maryland (Mr. BEALL) proposes an amendment on page 29, after line 21 add the following new section.

Mr. BEALL. Mr. President, I ask unanimous consent that further reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

On page 29, after line 21 add the following new section:

"SEC.--. Civil Rights.

"The Secretary shall take affirmative action to assure that no person shall, on the grounds of race, creed, color, national origin, or sex, be excluded from participating in any activity conducted with funds received from any grant made under this title. The Secretary shall promulgate such rules as he deems necessary to carry out the purposes of this section and may enforce this section, and any rules promulgated under this section, through

agency and department provisions and rules which shall be similar to those established and in effect under title VI of the Civil Rights Act of 1964. The provisions of this section shall be considered to be in addition to and not in lieu of the provisions of title VI of the Civil Rights Act of 1964."

Mr. BEALL. Mr. President, I am introducing an affirmative action amendment to S. 1972, the Airport Development Act of 1970. This amendment would, at page 43, line 17, strike out the final quotation mark and the final period and insert the following new section: Section 31, Civil Rights:

The Secretary shall take affirmative action to assure that no person shall, on the grounds of race, creed, color, national origin, or sex, be excluded from participating in any activity conducted with funds received from any grant made under this title. The Secretary shall promulgate such rules as he deems necessary to carry out the purposes of this section and may enforce this section, and any rules promulgated under this section, through agency and department provisions and rules which shall be similar to those established and in effect under title VI of the Civil Rights Act of 1964. The provisions of this section shall be considered to be in addition to and not in lieu of the provisions of title VI of the Civil Rights Act of 1964.

Mr. President, I consider this to be in the nature of a technical amendment actually but it will insure minority and female participation in program activities under the Airport Development Act. This amendment will require the development of affirmative action plans that will require that a portion of the money going to construction,

concessions, and other projects of the airport development are earmarked for minority and female business persons.

Although I am aware that there has been assurance of minority and female participation in these programs by the Department of Transportation in the past I am introducing this amendment so that airport management will be required to adhere to the Department of Transportation administrative regulations and will be required to contract with minority and female owned forms.

Mr. President, I might say that the Secretary of Transportation has given his approval to this amendment and the House has also adopted an amendment of this sort without objection. I hope the managers of the bill see fit to agree to the adoption of the amendment.

The PRESIDING OFFICER (Mr. FORD). The Senator from NEVADA.

Mr. CANNON. Mr. President, if the Senator would agree not to overtry his case, and with no objection, I am inclined to agree with him on it.

Mr. BEALL. With that, I rest my case.

The PRESIDING OFFICER. Is all time yielded back?

All time having been yielded back, the question is on agreeing to the amendment of the Senator from Maryland.

The amendment was agreed to.

Mr. PASTORE. Third reading.

Mr. CANNON. Third reading.

The PRESIDING OFFICER. If there be no further amendment to be proposed, the question is on the engrossment and third reading of the bill.

The bill was ordered to be engrossed for a third reading and was read the third time.

Mr. CANNON. Mr. President, I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second? There is a sufficient second.

The yeas and nays were ordered.

. . .

## PARLIAMENTARY INQUIRY

Mr. EDGAR. Mr. Chairman, I have a parliamentary inquiry.

The CHAIRMAN. The gentleman will state it.

Mr. EDGAR. Mr. Chairman, if we accept this amendment to delete from the bill the specific language relating to the Oakland International Airport, would a subsequent amendment be in order to delete on page 46, lines 1 through 4, which provide for an authorization of $72 million, which is a duplication of existing law?

The CHAIRMAN. A subsequent amendment to that portion of the bill would still be in order.

The question is on the amendment offered by the gentleman from Ohio (Mr. HARSHA).

The amendment was agreed to.

## AMENDMENT OFFERED BY MR. DELLUMS

Mr. DELLUMS. Mr. Chairman, I offer an amendment.

The Clerk read as follows:

Amendment offered by Mr. DELLUMS: Page 43, line 17, strike out the final quotation mark and the final period.

Page 43, immediately after line 17, insert the following new section:

"SEC. 31. CIVIL RIGHTS.

"The Secretary shall take affirmative action to assure that no person shall, on the grounds of race, creed, color, national origin, or sex, be excluded from participating in any activity conducted with funds received from any grant made under this title. The Secretary shall promulgate such rules as he deems necessary to carry out the purposes of this section and may enforce this section, and any rules promulgated under this section, through agency and department provisions and rules which shall be similar to those established and in effect under title VI of the Civil Rights Act of 1964. The provisions of this section shall be considered to be in addition to and not in lieu of the provisions of title VI of the Civil Rights Act of 1964."

Mr. ANDERSON of California (during the reading). Mr. Chairman, I ask unanimous consent that the amendment be considered as read and printed in the RECORD.

The CHAIRMAN. Is there objection to the request of the gentleman from California?

There was no objection.

Mr. DELLUMS. Mr. Chairman, this is a technical amendment designed to assure minority participation in program activities under this act. The language of the amendment is similar to--and based upon--comparable provisions enacted by Congress for other major programs, such as the Trans-Alaska Pipeline.

The need for this amendment came to my attention through a series of meetings held within the last 45 days

and conducted by my colleague from Maryland (Mr. MITCHELL) and myself with representative of the Federal Aviation Administration, the Office of Minority Business Enterprise, the Small Business Administration and minority businessmen. Those meetings centered on existing ADAP regulations, agreements and effectiveness, and it became apparent to me in those discussions that minority entrepreneurs had little share in projects funded under ADAP. This amendment stipulates that the Secretary of Transportation develop regulations to provide the affirmative action needed to remedy that problem.

Mr. SNYDER. Mr. Chairman, will the gentleman yield?

Mr. DELLUMS. I yield to the distinguished ranking minority member.

Mr. SNYDER. I thank the gentleman for yielding.

Mr. Chairman. I have looked over the amendment, and I have no objection to the gentleman's amendment. I think that it is a situation which already exists with the Department of Transportation, but to put it into law would not bother me at all. I am willing to accept it, as are the Members with whom I have discussed it.

Mr. ANDERSON of California. Mr. Chairman, will the gentleman yield?

Mr. DELLUMS. I yield to the gentleman from California.

Mr. ANDERSON of California. I thank the gentleman for yielding.

Mr. Chairman, I accept the gentleman's amendment, and I feel it is a useful addition to the program.

Mr. DELLUMS. I thank the gentleman.

The CHAIRMAN. The question is on the amendment offered by the gentleman from California (Mr. DELLUMS).

The amendment was agreed to.